No. 15-420

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
PETITIONER

v.

MICHAEL BRYANT, JR.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* CRIMINAL JUSTICE ORGANIZATIONS AND SCHOLARS IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Section 117(a) of Title 18 of the U.S. Code provides that it is a federal crime for any person to "commit[] a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country" if the person "has a final conviction on at least 2 separate prior occasions in Federal, State, *or Indian tribal court* proceedings for" enumerated domestic violence offenses, including misdemeanor offenses. 18 U.S.C. § 117(a) (emphasis added).

This brief addresses the following question, which is fairly subsumed within the question on which this Court granted review:

> Despite the constitutional doubts doctrine, the rule of lenity and the Indian law canon, must 18 U.S.C. 117(a) be construed to include even *uncounseled* convictions in tribal courts?

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INTRODUCTION AND INTERESTS OF *AMICI*[1]

The ultimate question in this case is whether an American Indian's prior conviction in tribal court can be used as a predicate for a recidivism prosecution in federal court under Section 117(a) of the Violence Against Women Act when the defendant lacked any right or opportunity to request counsel in the tribal court. Under the Government's interpretation, that provision poses a substantial risk that impoverished and often illiterate Native Americans will be sent to prison for extended periods based on uncounseled convictions, even for crimes they did not actually commit: Under that interpretation, an uncounseled conviction in tribal court—even for a misdemeanor—can be used as a predicate for the substantial sentencing enhancement that Section 117(a) allows. But that interpretation contravenes one of the main purposes of the Sixth Amendment right to counsel which, as this Court repeatedly has recognized, exists in large part to reduce the risk that criminal defendants will be "railroaded" by busy prosecutors and courts into pleading guilty to crimes of which they are innocent. *Strickland* v. *Washington*, 466 U.S. 668, 689 (1984); *Powell* v. *Alabama*, 287 U.S. 45, 52 (1932).

Amici—each described in more detail in the Appendix—are organizations and scholars focused on criminal justice. While they fully support the Act's objective of reducing violence against all women, they oppose any interpretation that would discriminate against American Indians by placing them at a substantial

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[1] No one other than *amici*, their members and counsel authored any part of this brief or made a monetary contribution to fund its preparation or submission. All parties have consented to its filing in communications on file with the Clerk.

risk of long prison sentences predicated on uncounseled tribal-court convictions, including for crimes they did not commit. Fortunately, neither the text of Section 117(a) nor the goal of reducing violence against Native American women requires that this provision be interpreted to subject impoverished American Indians to that risk.

There is, in short, a better path, one that not only guards against this risk but also avoids the need to resolve the serious constitutional issues implicated by this case. And that path is simply to construe Section 117(a)'s reference to "convictions" in tribal court as being limited to *counseled* convictions, at least where the conviction resulted in incarceration.

That approach better comports with the text and historical context of the provision–including the fact that the other "convictions" that can serve as statutory predicates for enhancement are likewise necessarily limited to counseled convictions. That approach also better comports with the rule of lenity that this Court applies to all federal criminal statutes. And that approach better comports with this Court's long-standing canon that statutes addressing American Indians should be interpreted, where fairly possible, to avoid a detrimental impact on them.

If, therefore, this Court is not fully persuaded by the Ninth Circuit's constitutional analysis—or even if it is—*amici* respectfully urge the Court to adopt this approach to construing Section 117(a). The Court should reject the Government's interpretation, which subjects disadvantaged American Indians to the unique and substantial risk of serving long prison sentences based on uncounseled convictions, including convictions for crimes they never committed.

STATEMENT

After his conditional guilty plea in the United States District Court for the District of Montana, respondent Michael Bryant, Jr. was convicted of domestic assault by a "habitual" offender, in violation of 18 U.S.C. § 117(a). Pet. App. 3a. Conviction under that provision requires "a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court" 18 U.S.C. § 117(a). Bryant, a member of the Northern Cheyenne Tribe, had pleaded guilty to two or more tribal court misdemeanors for domestic assault. Pet. App. 3a.

Throughout these tribal court proceedings, Bryant did not have the benefit of counsel. Pet. App. 5a. That is because, when an Indian tribe prosecutes its own members in its tribal court, it is not governed by provisions of the Federal Constitution, such as the Sixth Amendment. As this Court has observed, "[a]s separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56 (1978); *accord Duro* v. *Reina*, 495 U.S. 676, 693 (1990) ("the Bill of Rights does not apply to Indian tribal governments"). And, while the Indian Civil Rights Act of 1968 provides some procedural protections to Indian defendants, that statute does not provide a right to appointed counsel in tribal courts. See 25 U.S.C. §§ 1302(a)(2)–(10), 1303.

Before entering Bryant's conditional plea, the district court denied his motion to dismiss, which alleged that his indictment under Section 117(a) violated the Fifth and Sixth Amendments because it relied on his

uncounseled tribal court convictions. Pet. App. 3a; Motion to Dismiss, *United State* v. *Bryant*, Dkt. No. 11-70, Doc. 19, at 1–2 (D. Mont. Nov 7, 2011). But the United States Court of Appeals for the Ninth Circuit reversed that ruling. Pet. App. 1a–16a.

In its opinion, the Ninth Circuit recognized that respondent's uncounseled convictions were not themselves constitutionally infirm, because "the Sixth Amendment right to appointed counsel does not apply in tribal court proceedings." Pet. App. 7a–8a. Yet, based on its reading of *Nichols* v. *United States*, 511 U.S. 738 (1994), and the Ninth Circuit's own decision in *United States* v. *Ant*, 882 F.2d 1389 (1989), the appellate court determined that, because the tribal court convictions resulted in imprisonment and had not been imposed in a proceeding that "guarantee[d] a right to counsel that is, at minimum, coextensive with the Sixth Amendment right," the uncounseled convictions could not be relied upon to fulfill Section 117(a)'s predicate-offence requirement. *Id.* at 12a.

SUMMARY OF ARGUMENT

Although the Ninth Circuit decided this case on constitutional grounds, it did not need to do so, and this Court need not do so, either. Settled principles of interpretation provide ample basis for construing Section 117(a) to extend to tribal court convictions resulting in incarceration only when those convictions were counseled. Such a construction makes it unnecessary to decide whether the district court's admitted use of *uncounseled* tribal court convictions as a predicate for Bryant's conviction violated the Fifth or Sixth Amendments.

Indeed, no fewer than three settled principles of interpretation require that Section 117(a) be construed in this manner if the text allows it. First, under the constitutional doubts doctrine, if a statute can reasonably be read in a way that does not raise constitutional problems, that reading is preferred to an alternative that raises such problems. See, *e.g., United States* v. *Stevens*, 559 U.S. 460, 481 (2010). Surely the Ninth Circuit's constitutional analysis—and its holding that invocation of Section 117(a) here violates the Sixth Amendment—provide ample basis for invoking this doctrine. The rule of lenity points in the same direction, requiring that any ambiguities in criminal statutes be read in a defendant's favor. See, *e.g., Cleveland* v. *United States*, 531 U.S. 12, 25 (2000)). Finally, wherever possible, statutes that address Indians must be interpreted to avoid affecting them negatively, with doubtful provisions construed in their favor. See, *e.g., Montana v. Blackfeet Tribe,* 471 U.S. 759, 766 (1985). Here, it would be manifestly contrary to the interests of American Indians, many of whom are poor and lack

adequate education, to subject them to the risk of substantial federal prison time based on uncounseled tribal-court prosecutions, including for crimes of which they are innocent.

Nor is there any doubt that, insofar as tribal court convictions involving incarceration are concerned, Section 117(a) can reasonably be construed as limited to *counseled* convictions. First, the linguistic context of the word "convictions" suggests that Congress had in mind only counseled convictions—as indicated by its inclusion of "tribal court" convictions in a series with "Federal" and "State" convictions, both of which require a right to appointed counsel. See, *e.g., Freeman* v. *Quicken Loans, Inc.*, 132 S. Ct. 2034, 2042 (2012). Second, it is presumed that when Congress acts, it is aware of relevant, pre-existing legal precedent. See, *e.g., Merck & Co.* v. *Reynolds*, 559 U.S. 633, 648 (2010). And at the time Section 117(a) was adopted in 2006, the most directly pertinent authority was the Ninth Circuit's 1989 decision in *United States* v *Ant*, which held that the Sixth Amendment *bars* the government from using an uncounseled conviction that resulted in incarceration in a subsequent federal criminal prosecution. See 882 F.2d 1389, 1394–95 (1989).

For these reasons, whether or not the Court is persuaded by the Ninth Circuit's constitutional analysis, it can and should hold that, insofar as Section 117(a) covers tribal convictions resulting in incarceration, the statute is limited to counseled convictions. The Court can thus avoid subjecting disadvantaged Indians to the unique and substantial risk of serving long prison sentences based on uncounseled convictions, including convictions for crimes they never committed.

ARGUMENT

THE COURT CAN AND SHOULD CONSTRUE SECTION 117(A) AS NOT APPLYING TO UNCOUNSELED TRIBAL-COURT CONVICTIONS, THEREBY AVOIDING THE NEED TO RESOLVE THE CONSTITUTIONAL ISSUES PRESENTED HERE.

Before this Court addresses the constitutional questions presented here, it would be wise to first grapple with the statutory text. See *United States* v. *Quality Stores, Inc.*, 134 S. Ct. 1395, 1399 (2014). As shown below, settled principles of statutory interpretation require that Section 117(a) be read, if fairly possible, *not* to include uncounseled tribal-court convictions. And two accepted canons—*noscitur a sociis* and the rule that Congress is presumed to be aware of contemporaneous case law—make clear that Section 117(a) can reasonably be read not to include such convictions.

A. Settled principles require that Section 117(a) be read, if fairly possible, not to include uncounseled tribal-court convictions, at least where they resulted in incarceration.

Three traditional tools of statutory interpretation—the constitutional doubts doctrine, the rule of lenity and the Indian law canon—each strongly suggest that this Court should find Section 117(a) inapplicable to uncounseled tribal-court convictions.

1. Constitutional Doubts

First, this Court has repeatedly held that where reasonably possible statutory language should "'be

construed to avoid serious constitutional doubts.'" *United States* v. *Stevens*, 559 U.S. 460, 481 (2010) (quoting *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009)); *accord* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 247–51 (2012). This canon "rest[s] on the reasonable presumption that Congress did not intend [to] raise" such doubts. *Clark* v. *Martinez*, 543 U.S. 371, 381 (2005).

For reasons well explained by the Ninth Circuit and respondent, construing Section 117(a) to include uncounseled convictions that resulted in imprisonment raises Sixth Amendment and due process questions that are, at a minimum, difficult. This Court's decision in *Nichols* v. *United States* provided a limited exception to the Sixth Amendment's right to counsel: the federal government could use an uncounseled prior conviction to "enhance the sentence of a subsequent offense"—but only if the original conviction still "complied with the Sixth Amendment." 511 U.S. 738, 740 (1994). However, the federal government now demands that this exception be expanded to include uncounseled convictions obtained entirely outside the bounds of the Sixth Amendment—in sovereign tribal courts—and then use those convictions in federal courts that are constrained by this constitutional provision. See *United States* v. *Bryant*, 769 F.3d 671, 677–78 (9th Cir. 2014). This approach thus implicates serious Sixth Amendment and due process issues that are not easily resolved.

Instead of deciding whether Congress intended to violate or even approach violating these constitutional

principles, this Court should instead construe the statute in a way that avoids these constitutional questions.

2. Rule of Lenity

Additionally, given that Section 117(a) is a criminal statute "if [this Court's] recourse to traditional tools of statutory construction leaves any doubt about the meaning of [the statute]," it must apply the rule of lenity. *Yates* v. *United States*, 135 S. Ct. 1074, 1088 (2015) (plurality opinion); *accord* SCALIA & GARNER, READING LAW at 296–302. This rule requires that any "'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *Id.* (quoting *Cleveland* v. *United States*, 531 U.S. 12, 25 (2000)).

If the Court is uncertain as to how Section 117(a) law comports with the Sixth Amendment right to counsel and associated due process principles—or even as to how the statute should be interpreted apart from constitutional concerns—the Court should resolve this uncertainty in favor of the criminal defendant. As discussed below, it is far from clear that Congress intended this law to apply to defendants who were never provided the right to counsel, especially those imprisoned as a result of an earlier prosecution. And when Congress does not clearly detail what it intends to punish, the resulting uncertainty should be resolved in favor of the defendant.

3. Laws Affecting Indians

This Court has also long held that where reasonably possible "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Blackfeet Tribe*, 471 U.S. at

766 (1985). To be sure, the canon "does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." *South Carolina* v. *Catawba Indian Tribe*, 476 U.S. 498, 506 (1986). But if there *is* ambiguity, the meaning of a statutory provision addressing Indians should be resolved in accordance with this Court's Indian law canons. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §2.02 at 113 (Nell Jessup Newton et al. eds., 2012) (citing Supreme Court cases for the proposition that "[t]he basic Indian law canons of construction require that treaties, agreements, statutes, and executive orders be construed liberally in favor of the Indians and that all ambiguities are to be resolved in their favor.").

Here, as Petitioner notes, Congress had a clear intention to protect Native American women and to punish repeat domestic abusers. See Pet. Br. at 6. But as discussed below, there is no clear intention from the text or context that Congress intended to enhance the punishments for defendants based on uncounseled convictions, especially when those convictions resulted in incarceration. And especially in light of recent amendments to the Violence Against Women Act, it is most unlikely that Section 117(a)'s worthy objective would be materially advanced by allowing federal prosecutors to rely upon uncounseled convictions.[2]

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[2] The Violence Against Women Act of 2013 gave tribes the authority necessary to exercise "special domestic violence jurisdiction" over domestic violence offenders, regardless of their race. 25 U.S.C. § 1304(b). Congress also set aside funds so that the Attorney General can strengthen tribal courts, § 1304(f)(1), including supporting tribal prosecution efforts. § 1304(f)(1)(B). Armed

Moreover, it would be manifestly contrary to the interests of American Indians, many of them poor and lacking in literacy and education,[3] to subject them to the risk of substantial federal prison sentences based on uncounseled tribal-court prosecutions, including for crimes of which they are innocent. This and other courts have long recognized the critical importance of the right to counsel in protecting defendants from the risk of conviction based on flimsy evidence or, worse, when they are actually innocent. In *Whorton* v. *Bockting*, for example, the Court noted that "the risk of an unreliable verdict is intolerably high" when a criminal defendant is denied representation. 127 S. Ct. 1173, 1182 (2007) (*citing Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963)). Representation by counsel in critical stages of criminal proceedings is thus crucial to ensure fair and accurate outcomes, regardless of the quality of the courts conducting those proceedings. See, *e.g.*, *Missouri* v. *Frye*, 132 S. Ct.1399, 1405 (2012) (quoting *Montejo* v. *Louisiana*, 556 U.S. 778, 786 (2009)).[4] Indeed, for these and other reasons, this Court has said the right to counsel is so important that its complete

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with these tools, tribal courts and prosecutors are now much better equipped to handle domestic violence prosecution than they were when Section 117(a) was enacted.

[3] See NATIONAL CENTER FOR EDUCATION STATISTICS, Adult Literacy in America at 31 (1993) https://nces.ed.gov/ pubs93/93275.pdf (noting that half of adult American Indians are illiterate); Jens Manuel Krogstad, *One-in-four Native Americans and Alaska Natives are living in poverty*, PEW RESEARCH (June 13, 2014), http://www.pewresearch.org/fact-tank/2014/06/ 13/1-in-4-native-americans-and-alaska-natives-are-living-in-poverty/.

[4] That, of course, is why the position urged here does not in any way denigrate tribal courts.

denial is one of the "very limited class of cases" in which the error is structural and thus subject to automatic reversal. See *Neder* v. *United States*, 527 U.S. 1, 8 (1999).

Given the enormous risks to American Indians if Section 117(a) were interpreted as the Government proposes, the Indian law canon requires that the statute be interpreted in a way that favors Indian defendants–in this case, by not including uncounseled tribal-court convictions.[5]

B. Under two settled canons of construction, Section 117(a) can reasonably be read (at a minimum) as limited to counseled convictions.

Settled canons of construction also make clear that Section 117(a) can reasonably read in that manner. The language of Section 117(a) reaches defendants who have "a final [domestic abuse] conviction in Federal, State, or Indian tribal court proceedings." 18 U.S.C. § 117(a) (Supp. II 2014). The phrase "conviction in Indian tribal court" does not automatically establish that uncounseled tribal-court convictions are included.

To determine the proper meaning of that phrase, or at least its permissible meanings, it is important to ex-

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[5] This approach, of course, would also allow Congress to amend the law if it really intends that Section 117(a) apply to all uncounseled tribal court convictions. Obviously, such an amendment would be subject to challenge under the Fifth and Sixth Amendments. And it would be invalid for reasons explained by the Ninth Circuit and respondent here. But at least this Court would know that the Government's construction of Section 117(a) is really what Congress intends.

amine the context of the phrase as well as of the statute. See *Yates*, 135 S. Ct. at 1081–82. And in this case, the Court should first apply the *noscitur a sociis* or "associated words" canon to examine the phrase's textual context. Then the Court should examine the statute's broader context, bearing in mind the presumption that Congress is aware of pre-existing case law.

1. *Noscitur a Sociis*

As the Court is well aware, *noscitur a sociis* simply means that "'a word is given more precise content by the neighboring words with which it is associated.'" *Freeman* v. *Quicken Loans, Inc.*, 132 S. Ct. 2034, 2042 (2012) (quoting *United States* v. *Williams*, 553 U.S. 285, 294 (2008); *accord* SCALIA & GARNER, READING LAW at 195–98. The Court relies on this principle to "'avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress.'" *Yates*, 135 S. Ct. at 1085 (quoting *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995)); 1089 (Alito, J., concurring) (agreeing with the four justices in plurality that this canon should apply).

For example, in *Freeman*, this Court determined that the meanings of the words "portion" and "percentage" did not "mean the entirety" See 132 S. Ct. at 2042. The third word, "split," provided the needed clarification. Because "split" could not refer to "the entirety," neither could "portion" or "percentage." See *id.* Thus the neighboring words can inform as to what Congress meant when it used the word or phrase at issue. And the Court could therefore properly focus on what the *neighboring* words or phrases had in common and apply that to the word or phrase at issue. See *id.*

at 2042; see also *Yates*, 135 S. Ct. at 1085; *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961).

Here, the phrase "Indian tribal court proceedings" is preceded by "Federal" and "State" court proceedings. See 18 U.S.C. § 117(a) (Supp. II 2014). And the United States Constitution requires that, where incarceration is at issue, criminal defendants must be provided counsel in both federal and state courts. See U.S. CONST. amend. VI; *Gideon* v. *Wainwright*, 372 U.S. 335, 342–45 (1963); *Murray* v. *Giarratano*, 492 U.S. 1, 6 (1989); *Maryland* v. *Kulbicki*, 136 S.Ct 2, 3 (2015) (per curiam). Thus, a requirement that is necessarily applicable to the neighboring phrases—that is, a requirement that the conviction be "counseled"—would naturally apply to the phrase "conviction in tribal court" as well.

Another example is *State* v. *Taylor*, 594 N.W.2d 533 (Minn. Ct. App. 1999), discussed and endorsed in the treatise by Justice Scalia and Bryan Garner. See SCALIA & GARNER, *supra*, at 196–97. In that case, a statute made it a crime to carry or possess a pistol in a motor vehicle unless it was unloaded and "contained in a closed and fastened case, gunbox, or securely tied package." 594 N.W.2d at 535. When police stopped the defendant, Ms. Taylor, it was discovered that she had a pistol in her (presumably closed) purse, on the basis of which she claimed that she was carrying the pistol lawfully. On appeal, however, the State argued that *noscitur a sociis* requires that the word "case" be read restrictively, that is, as a container that prevents the gun from being readily retrievable. *Id.* at 536.

The appellate court recognized that the defendant's proposed reading—i.e., any closed and fastened recep-

tacle, including her purse—comported with the ordinary meaning of "case." But the court ultimately agreed with the State that, given the surrounding words in the statute, "'case' should be construed in a similarly narrow sense.'" *Id.* Accordingly, the court ruled that "'case' should be construed as having a limited, technical meaning similar to 'gunbox,' the word that follows it." *Id.*

So too here. As in *Taylor,* the word "conviction" in ordinary parlance might well include Mr. Bryant's prior uncounseled misdemeanor convictions. See Respondent's Brief at 23–28. But in the context of *this* statute, it is at least permissible – if not mandatory – to read the word "conviction" in the more limited, technical sense of a "conviction" that complies with the constitutional requirements applicable in the other classes of proceedings listed in the statute, that is, "Federal [or] State court" proceedings. And that of course means that, at least where incarceration results, for the statute to apply the defendant must have been afforded a right to counsel.

In short, *noscitur a sociis* makes it at least reasonable to read "conviction" in Section 117(a) as requiring compliance with the usual Sixth Amendment requirements—even though that Amendment may not of its own force technically apply to proceedings in tribal court.

2. Presumption that Congress Is Aware of Relevant Law

The well-settled presumption that Congress is aware of relevant background law makes such a reading even more reasonable. Specifically, the existence of *Nichols* and *Ant* when Section 117(a) was passed

strongly suggests a legislative intention or understanding that, where incarceration results, predicate offenses must be counseled. This Court "assume[s] that, when Congress enacts statutes, it is aware of relevant judicial precedent." *Merck & Co.*, 559 U.S. at 648.

Congress passed Section 117(a) in 2006. See 18 U.S.C. § 117(a) (Supp. II 2014) At that time, it presumably was aware of *Nichols*. So it presumably knew that only when an uncounseled prior conviction *complies* with the Sixth Amendment, it can be "relied upon to enhance the sentence for a subsequent offense, even though that sentence entails imprisonment." *Id.* at 740, 746–47. And that strongly suggests that, when the prior conviction does not "comply" with the Sixth Amendment–either because that Amendment was affirmatively violated *or* because, as here, that Amendment simply didn't apply in the prior proceedings—Congress would not assume that the prior conviction could serve as a predicate offence under Section 117(a).

That conclusion is buttressed by the presence of *United States* v. *Ant*, 882 F.2d 1389 (9th Cir. 1989), which squarely answers that question. Indeed, *Ant* would have been the *only* appellate decision at the time dealing with the specific issue of using uncounseled prior convictions from tribal court; neither of the two circuit decisions that later disagreed with *Ant* were decided until after the statute passed. See *United States* v. *Shavanaux,* 647 F.3d 993 (10th Cir. 2011); *United States* v. *Cavanaugh,* 643 F.3d 592 (8th Cir. 2011).

Ant, moreover, held that when an uncounseled prior conviction is obtained in a manner that *would have violated* the Sixth Amendment in federal or state

court, it cannot be used as a sentence enhancing tool. See *Ant*, 882 F.2d at 1394–95. Thus it deals with a different situation than *Nichols*, and indeed is still considered valid law.

Moreover, while some academics may have argued in 2006 that there was some tension between *Nichols* and *Ant*, Congress certainly did not have a conclusive answer on whether *Ant* was still valid. So Congress must be presumed to have known that, if it wished to include *uncounseled* tribal-court convictions in Section 117(a), it needed to do so expressly and clearly.

Because it did not address the *Ant* decision, either directly or indirectly, Congress appears to have either intended to exclude uncounseled convictions or, at a minimum, did not purposefully intend to include them. Either way, Congress's silence on that issue in the face of *Ant* buttresses the conclusion that, to the extent it reaches proceedings that resulted in incarceration, Section 117(a)'s reference to "convictions in tribal court proceedings" should be read to encompass only counseled convictions.

CONCLUSION

For all these reasons, the Court can and should interpret Section 117(a) as not applying to uncounseled tribal-court convictions. Such a construction will substantially reduce the risk that indigent American Indians—unlike other impoverished groups—will routinely be sentenced to substantial prison time based on uncounseled prior convictions, including convictions for crimes they did not commit. Accordingly, the decision below should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A: Interests of Particular *Amici*

The National Association for Public Defense ("NAPD") is an association of over 11,000 professionals critical to delivering the right to counsel. NAPD members include attorneys responsible for managing public defender programs and ensuring the constitutional right to effective assistance of counsel. We are the advocates in jails, in courtrooms, and in communities and are experts in not only theoretical best practices, but also in the practical, day-to-day delivery of services. Our collective expertise represents state, county, and local systems through full-time, contract, and assigned counsel delivery mechanisms, dedicated juvenile, capital, and appellate offices, and through a diversity of traditional and holistic practice models.

Arizona Attorneys for Criminal Justice ("AACJ"), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

Missouri Association of Criminal Defense Lawyers (MACDL) is dedicated to protecting the rights of criminally accused through a strong and cohesive criminal defense bar. It strives to improve the quality of justice in Missouri by seeking to ensure fairness and equality before the law

The Montana Association of Criminal Defense Lawyers ("MTACDL") is an affiliate of the National Association of Criminal Defense Lawyers. MTACDL was formed in 1997 to ensure justice and due process for persons accused of crimes; to foster the integrity, independence and expertise of those who represent persons accused of crimes; and to promote the proper and fair administration of justice.

Oregon Criminal Defense Lawyers Association ("OCDLA") is a 1,200-member non-profit organization of private criminal defense attorneys, public defenders, investigators and others engaged in criminal and juvenile defense. OCDLA works to improve the quality of the defense function in the juvenile and adult justice systems, protect the constitutional and statutory rights of those accused and convicted of crimes, and educate the public, the courts, and the legislature about the defense function.

Washington Association of Criminal Defense Lawyers (WACDL) was formed to improve the quality and administration of justice. A professional bar association founded in 1987, WACDL membership includes private criminal defense lawyers, public defenders, and related professionals, all committed to preserving fairness and promoting a rational and humane criminal justice system. WACDL joins this brief as a part of its mission to promote justice and protect individual constitutional rights.

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